UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRTIETH REGION

DURHAM SCHOOL SERVICES, LLP[1]

Employer

and Case 30-RC-6632

TEAMSTERS LOCAL UNION NO. 43,
AFFILIATED WITH THE INTERNATIONAL
BROTHERHOOD OF TEAMSTERS

Petitioner

DECISION AND DIRECTION OF ELECTION[2]

The Employer raised three issues at the hearing: 1) whether the Employer is an employer within the meaning of the Act; 2) whether the Petitioner is a labor organization within the meaning of the Act[3]; and 3) whether the petition is untimely, having been filed within six months of the withdrawal of the previous petition in Case 30-RC-6310. Petitioner contends the Employer meets the Board's jurisdictional standards, it is a labor organization under the Act, and that there is no bar to the processing of the petition.

[1]The names of the Employer and Petitioner appear as amended at the hearing. The Employer refused to stipulate to the Petitioner's legal name. Based on Petitioner's representation at the hearing, I find that it's legal name is as appears above.

[2]Upon a petition filed under Section 9(c) of the National Labor Relations Act, as amended (Act), a hearing was held before a hearing officer of the National Labor Relations Board (Board). Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. The Hearing Officer's rulings are free from prejudicial error and are affirmed.

[3]In its brief, the Employer conceded Petitioner is a labor organization within the meaning of the Act.

I find that the Employer is an employer within the meaning of the Act, that Petitioner is a labor organization within the meaning of the Act, and that there is no bar to the filing of the petition in this case.[4]

The following employees of the Employer constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act.[5]

> All full time and regular part time drivers and attendants employed at the Employer's Racine, Wisconsin facility; excluding office clerical employees, mechanics, dispatchers, assistant dispatchers, payroll/charter clerks, RUSD student liaison, full time and part-time safety and training technicians, third party testers, guards and supervisors as defined in the Act.

BACKGROUND

Pursuant to an October 12, 2001 Decision and Direction of Election, an election was conducted on November 9, 2001, among the Employer's employees in the following unit:

> All full-time and regular part-time drivers, including stand-by drivers, aides and student discipline liaison employed by the Employer at the Employer's Racine, Wisconsin facility; excluding all office clerical employees, dispatchers, mechanics, safety technicians, confidential employees, guards and supervisors as defined in the Act.

The tally of ballots, served on the parties on the day of the election, showed that of approximately 215 eligible voters, 60 cast ballots for, and 143 cast ballots against the Petitioner. There were three challenged ballots, which were not sufficient in number to affect the results of the election. On November 16, 2001, Petitioner filed timely

[4]The Employer filed a post-hearing brief which was carefully considered. A question concerning commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

[5]The parties stipulated that the unit is appropriate for the purposes of bargaining and I find that to be the

case.

objections to conduct affecting the results of the election. On December 31, 2001, the Regional Director for the Thirtieth Region issued a Notice of Hearing on Objections to Conduct Affecting the Results of the Election, in Case 30-RC-6310, setting a hearing for March 12, 2002. Contemporaneously, the Regional Director consolidated the objections hearing with the unfair labor practice hearing in Cases 30-CA-15546-1, et al. On March 1, 2002, the Regional Director rescheduled the consolidated hearing to April 29, 2002.

On October 20, 2003, after the hearing opened and several days of testimony were entered, the Employer and Petitioner signed, and the Administrative Law Judge approved, an Informal Settlement Agreement remedying all the unfair labor practices and objections alleged. As part of the Informal Settlement Agreement, the parties agreed, among other things, to the following:

> IT IS HEREBY STIPULATED AND AGREED by and between the Employer and the Petitioner that the above election be set aside and that a second election be held following the conclusion of the 60 day posting period for the "Notice to Employees" in Cases 30-CA-15546-1.

An election was scheduled for January 30, 2004. Subsequently, an Order Postponing Election Indefinitely, pending the investigation of various unfair labor practice charges, in Cases 30-CA-16710, et al., issued on January 28, 2004. The allegations, in cases 30-CA-16710, et al., were later settled. The unfair labor practice allegations in Cases 30-CA-15546-1, et al. were closed in compliance on December 2, 2005.

On December 7, 2005, the Union sent a letter to the Regional Office requesting that the petition in Case 30-RC-6310 be withdrawn, noting "We will reserve our right to re-file a petition at a later date." On December 8, 2005, the Acting Regional Director signed an Order Approving

Withdrawal of Petition approving withdrawal of the petition. The Order did not set any restrictions on Petitioner's ability to file another representation petition. The petition in this case was filed March 31, 2006.

Analysis

A. The Jurisdictional Issue

The Employer's Counsel refused to stipulate that the Board had jurisdiction over the Employer. Counsel explained that his refusal to stipulate to jurisdiction resulted from his dissatisfaction with the Region's position at the hearing --precluding the Employer from litigating the issue whether the current petition was barred for six months:

> ". . .we have taken this approach which severely prejudices the Employer's opportunity to litigate an issue which is properly addressed and raised within this hearing procedure and the Region's, the Hearing Officer's and the Acting Regional Director's refusal to exercise their obligations under Section 9 of the Act by conducting the hearing in a manner which would simply request (sic) that the Employer's representative restate from memory all of the potential evidence that would support its position as opposed to hearing the evidence having the opportunity to decide the issue based on the evidence itself." Another member of Counsel's law firm, on September 28, 2001, stipulated in Case 30

RC-6310 to the following:

> The Employer, a Kansas corporation, is engaged in the business of providing transportation for school children from its Racine, Wisconsin facility. During the calendar year ending December 31, 2000, the Employer received gross revenues in excess of $250,000 and during the same period purchased and received goods in excess of $50,000 directly from suppliers located within the State of Wisconsin who in turn purchased those same goods and materials directly from suppliers located outside the State of Wisconsin.

Counsel, without explanation or even an offer to provide evidence of changed circumstances, declared at the hearing in this case:

> ". . .on behalf of the Employer the company and any and all of its representatives and

agents affirmatively disavow any and all stipulations entered into in 2001 in

> Case 30-RC-6310 including but not limited to any stipulation as to the Employer's commerce -- I'm sorry, as to the Employer's engaging in commerce and the union's status as a labor organization within the meaning of the Act."

On April 5, 2002, in Cases 30-CA-15857-1; 30-CA-15863-1; and 30-CA-15864-1, an Order Consolidating Cases and Consolidated Complaint issued. Paragraphs 2(b) and (c) of the Order read:

> (b) During the year ending December 31, 2001, Respondent, in the course and conduct of its business operations described above in paragraph 2(a), received gross revenue in excess of $250,000, and during the same period of time, purchased and received at its Racine, Wisconsin, facility, goods and materials valued in excess of $50,000 directly from suppliers located within the State of Wisconsin, who in turn purchased these same goods and materials, valued in excess of $50,000, directly from suppliers located outside the State of Wisconsin.
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> (c) At all material times, Respondent has been engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

Answering paragraphs 2(b) and (c) of the Order, a member of Counsel's firm averred:

> (b) Respondent admits the allegations advanced in Paragraph 2(b) of the Consolidated Complaint and Notice of Hearing.
>
> (c) Respondent admits the allegations advanced in Paragraph 2(c) of the Consolidated Complaint and Notice of Hearing.

On October 20, 2003, the Employer signed a Settlement Agreement Approved by an Administrative Law Judge (involving the Employer and Petitioner), in Cases 30-CA-15546-1, et al., thereby conceding the Employer was subject to the Board's jurisdiction. A member of Counsel's firm, on August 12, 2004, signed yet another Settlement Agreement Approved by an Administrative Law Judge. This Settlement Agreement, in Cases 30-CA-16710-1, et al., also involved the Employer and Petitioner, and is another acknowledgement of the Board's jurisdiction over the Employer.

The Employer raised no objection to the Board's asserting jurisdiction in Case 32-RD1477, a Decision and Direction of Election, dated April 1, 2005. In that Decision, the Regional Director found:

> During the past twelve months, the Employer has, in the course and conduct of the above- described business operations, received gross revenues in excess of $250,000 from a consortium made up of public school districts. The Record also shows that the Employer also does business in other states and has its corporate headquarters in Texas. I also note that, according to its website, Durham School Services was formed in 2001, when five companies were rebranded under one name--Durham School Services. The website also states that the Employer is part of National Express Corporation, which is a subsidiary of National Express Group, PLC, one of the largest transportation firms in the United Kingdom. The Employer now operates in 275 public school districts in 20 states, and its fleet has grown to include more than 8,400 school buses. . . . Based on the above, I find that the Employer is engaged in commerce within the meaning of the Act. (Id. at p. 2, n. 3)

I also take judicial notice of the Employer's website (http://www.durhamschoolservices.com (visited on April 21, 2005)). On the site, the Employer declares that it operates a fleet of nearly 9,000 school buses in 271 school districts throughout the nation. Additionally, the website states:

> "With a presence in 21 States and growing, Durham School Services' Operations vary in scope and history across the Country."

Based on all of the above, including unwithdrawn stipulations[6], a 2005 concession of jurisdiction, and statements on its website, I find that the Employer is engaged in commerce within the meaning of the Act.

[6]The Employer argued in its brief that it ". . .would have been more than happy to have provided additional evidence regarding the commerce issue if it would have had adequate time to prepare for and present evidence at the hearing." The Employer refused to stipulate to jurisdiction at this hearing. Counsel's law firm participated in an unfair labor practice hearing involving the Employer and Petitioner, and signed two Informal Settlement Agreements. Either Counsel's law firm misrepresented answers to commerce allegations in previous complaints or Counsel is being disingenuous.

B. The Labor Organization Status of Petitioner

Contrary to its position at the hearing, the Employer's brief concedes Petitioner is a labor organization within the meaning of the Act. Based on the record's uncontradicted evidence that Petitioner represents employees in collective bargaining, I find that Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

C. The Timeliness of the Petition

At the hearing, and in its brief, the Employer argued that the Board cannot process a petition by Petitioner in this unit until on or after June 7, 2006, six months after the withdrawal of the petition in Case 30-RC-6310. The Employer asserts that Sections 11112.1(a) and 11118 of the Board's Casehanding Manual govern the timeliness of the petition in this case. In support of its argument, the Employer contends that it was prejudiced by the Hearing Officer's refusal to allow evidence, and only permit an offer of proof, to establish whether the petition in this case was prematurely filed and/or whether "good cause" existed to process the petition.

The Employer's reliance on Sections 11112.1(a) and 11118 of the Board's Casehandling Manual are misplaced. Section 11112.1(a) is applicable only to those cases were an election has never been held:

> Where, after the approval of an election agreement or the close of a hearing, **but before the holding of the election. . .** (bold added).

In the circumstances governed by Section 11112.1(a), a Union is precluded from filing a petition for 6 months, in order to conserve the parties' (including the Board's) resources. Section 11118 applies only

where there is a 6 month prejudice period ("11118 Prejudice Period; Good Cause"); if there is no prejudice period, Section 11118 does not apply.

In this case, Section 11116.4 is the applicable provision in the Board's Casehandling Manual:

> A withdrawal request submitted after an election has been set aside on the basis of the petitioner's objections should, absent extraordinary circumstances, be approved by the Regional Director without prejudice.

An election was conducted on November 9, 2001, and Petitioner filed objections on November 16, 2001. On October 20, 2003, as part of an Informal Settlement Agreement resolving the November 16, 2001 objections, the Employer agreed, among other things, to the following:

> IT IS HEREBY STIPULATED AND AGREED by and between the Employer and the Petitioner **that the above election be set aside** and that a second election be held following the conclusion of the 60 day posting period for the "Notice to Employees" in Cases 30-CA-15546-1. (bold added)

All the factual elements in this case (election, objections, setting aside the election based on those objections) require that this case be governed by Section 11116.4, which unmistakably does not provide for a prejudice period. Therefore, the December 8, 2005 Order Approving Withdrawal of Petition properly did not include a prejudice period. At no time after the issuance of this Order, until the hearing on April 12, 2006, did the Employer protest the lack of a prejudice period. The Employer, neither at the hearing nor in its brief, proffered any "extraordinary" circumstances that would require a prejudice period.

At the hearing, and in its brief, the Employer argued that *Sears Roebuck & Co.*, 107 NLRB 716 (1954) established that there must be a six month prejudice period in this case. In *Sears*, the Petitioner asked to withdraw its petition before the scheduled election. Three other cases, cited in the Employer's brief, likewise involve withdrawals before the scheduled elections: *Campos Dairy Products*, 107 NLRB 715 (1954); *Little Rock Road Machinery Co.*, 107 NLRB 715 (1954); *Consolidated Co., 117 NLRB 1784 fn. 1 (1957).* Because these cases are predicated

on the assumptions underlying Section 11112.1(a), they lend no support to the Employer's arguments.

CONCLUSION

I find that the Employer is engaged in commerce within the meaning of the Act, and that it is appropriate to assert jurisdiction in this case. I also find that the petition in this case is timely filed and that there is no six month prejudice period attached to the withdrawal of the petition in Case 30-RC-6310. Accordingly, I direct the election in the following appropriate unit:

> All full time and regular part time drivers and attendants employed at the Employer's Racine, Wisconsin facility; excluding office clerical employees, mechanics, dispatchers, assistant dispatchers, payroll/charter clerks, RUSD student liaison, full time and part time safety and training technicians, third party testers, guards and
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> supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in any economic strike who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which

commenced less than 12 months before the election date, employees engaged in

such a strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commended more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by **Teamsters Local Union No. 43, affiliated with the International Brotherhood of Teamsters.**

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 384 U.S 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359 (1994). Accordingly, it is directed that within 7 days of the date of this Decision, the Employer shall file with the undersigned, **two** copies of an election eligibility list, containing the **full** names (including first and last names) and addresses of all the eligible voters, and upon receipt, the undersigned shall make the list available to all parties to the election. To speed preliminary checking and the voting process itself, it is requested that the names be alphabetized. **In order to be timely filed, such list must be received in the Regional Office, Suite 700, Henry S. Reuss Federal Plaza, 310 West**

Wisconsin Avenue, Milwaukee, Wisconsin 53203 on or before Apri128, 2006. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay this requirement.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, Franklin court, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by May 5, 2006.

Signed at Milwaukee, Wisconsin this 21 st day of April, 2006.

/sBenjamin Mandelman

Benjamin Mandelman, Acting Regional Director
National Labor Relations Board Thirtieth Region
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